BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CLEM FLECK and KATHY FLECK, Petitioners, vs. MARION COUNTY, Respondent.	LUBA No. 93-064
	FINAL OPINION AND ORDER

Appeal from Marion County.

Gregory G. Lutje, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Schwabe, Williamson & Wyatt.

Robert C. Cannon, County Counsel; and Jane Ellen Stonecipher, Assistant County Counsel, Salem, filed the response brief. Jane Ellen Stonecipher argued on behalf of respondent.

SHERTON, Chief Referee; HOLSTUN, Referee; KELLINGTON, Referee, participated in the decision.

REMANDED 08/20/93

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Sherton.

NATURE OF THE DECISION

Petitioners appeal a county decision approving a farm dwelling.

FACTS

The subject parcel is designated Primary Agriculture on the Marion County Comprehensive Plan (plan) map and is zoned Exclusive Farm Use (EFU). The parcel is 14.3 acres in size and undeveloped. The parcel is comprised of 70% U.S. Soil Conservation Service (SCS) Class II soils and 30% SCS Class IV soils. The parcel is currently used as pasture.

On October 9, 1993, the county received an application for a farm dwelling on the subject parcel. The applicants proposed to establish a farming operation on the subject parcel consisting of five acres of strawberries, four acres of boysenberries and four acres of marionberries. On November 9, 1992, the county planning director issued a decision denying this application based, in part, on a finding that "a commercial farm enterprise requires an absolute minimum of 10 acres of strawberries [or] 30 to 50 acres of caneberries." Record 36.

The applicants appealed the planning director's decision to the county hearings officer. The applicants changed their proposed farming operation to 14 acres of strawberries. After a public hearing, the hearings officer issued a decision approving the application, with conditions

that are discussed in more detail below. Petitioners appealed to the board of county commissioners. On March 25, 1993, the board of commissioners adopted a decision approving the application and adopting the hearings officer's findings, conclusions and conditions. This appeal followed.

ASSIGNMENT OF ERROR

A. Currently In Farm Use

Petitioners contend the challenged decision violates ORS 215.283(1)(f), OAR 660-05-030(4), and Marion County Zoning Ordinance (Rural) (MCZO) 136.020(c) and 136.040(a)(2) by approving a farm dwelling on property that is not currently in farm use, without requiring that the requisite amount of farm use be in existence on the property prior to placement of the dwelling on the property. Petitioners also argue the county cannot condition approval of the proposed farm dwelling on the future establishment of the proposed farm operation, without including in its decision a requirement that notice and an opportunity for hearing be provided regarding compliance with that condition.

The provisions of ORS 215.213 and 215.283 establishing the uses that are allowable on exclusive farm use zoned land apply directly to the county's decision. Schrock Farms, Inc. v. Linn County, 117 Or App 390, 394, 844 P2d 253 (1992); Forster v. Polk County, 115 Or App 475, 478, 839 P2d 241 (1992). ORS 215.283(1)(f) authorizes the county to

allow "dwellings and other buildings commonly provided in conjunction with farm use" in its EFU zone.[1] As is explained in Newcomer v. Clackamas County, 94 Or App 33, 37-39, 764 P2d 927 (1988), the Land Conservation and Development Commission (LCDC) has adopted the following rule provision explaining what is required by ORS 215.283(1)(f):

> "* * * ORS 215.283(1)(f) authorize[s] a farm dwelling in an EFU zone only where it is shown that the dwelling will be situated on a parcel currently employed for farm use as defined in ORS 215.203. Land is not in farm use unless the day-to-day activities on the subject land are principally directed to the farm use of the land. Where land would be principally used for residential purposes rather than farm use, a proposed dwelling would not be 'customarily provided in conjunction with farm use' * * *. At a minimum, farm dwellings cannot be authorized before establishment of farm uses on the land

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[1]MCZO 136.020(c) lists "[a] single-family dwelling or mobile home and other structures customarily provided in conjunction with farm use subject to [MCZO] 136.040(a)" as allowed in the EFU zone. As relevant here, MCZO 136.040(a)(2) establishes the following approval criterion:

> "The property on which the dwelling will be located must be in farm use and the dwelling [must] be in conjunction with the farm use based on [MCZO] 136.040(f)[.]" (Emphasis added.)

MCZO 136.040(f) establishes a list of factors to be considered in determining whether a dwelling is "customarily provided in conjunction with farm use."

No party contends MCZO 136.020(c) and 136.040(a)(2) and (f) impose stricter requirements than ORS 215.283(1)(f) and OAR 660-05-030(4). Therefore, we limit our consideration under this section to interpretation and application of the state statute and administrative rule. Forster, supra; Kenagy v. Benton County, 115 Or App 131, 136 n 3, 838 P2d 1076 (1992).

* * *."[2]

In Forster, supra, 115 Or App at 479-81, the court of appeals concluded that although OAR 660-05-030(4) does require some degree of actual current farm use of property as a prerequisite to permitting a farm dwelling on such property under ORS 215.283(1)(f), it does not require full establishment of all planned farm uses in all cases. The court remanded the case to this Board to consider the issue of what amount of actual farm use of property OAR 660-05-030(4) requires to precede the approval or construction of a farm dwelling on that property.[3]

In Hayes v. Deschutes County, 23 Or LUBA 91, 98-99 (1992), we interpreted OAR 660-05-030(4) as follows:

> "* * * OAR 660-05-030(4) must be construed in its entirety. The second and third sentences of this section of the rule provide guidance on how to determine whether a proposed dwelling is 'customarily provided in conjunction with farm use,' as required by ORS 215.213(1)(g) or 215.283(1)(f). Newcomer [v. Clackamas County, supra, 94 Or App at 38-39]. They refer to the 'day-to-day activities on the subject land' and to 'whether land would be principally used for

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[2]The provisions of OAR Chapter 660, Division 5 were repealed on August 7, 1993. OAR 660-33-160. However, approval or denial of the subject farm dwelling application is required to be based on the standards and criteria that were applicable when the application was submitted to the county. ORS 215.428(3).

[3]The proper interpretation of state statutes and administrative rules is a question of law for this Board to decide, and is not subject to the limitations that Clark v. Jackson County, 313 Or 508, 836 P2d 710 (1992), places on this Board's review of interpretations of local enactments. Forster, supra, 115 Or App at 478.

> residential purposes rather than for farm use.' (Emphasis added.) We believe these sentences require consideration of the farm use which the proposed dwelling is contended to be customarily provided in conjunction with.
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> "In addition, the fourth sentence states 'farm dwellings cannot be authorized before establishment of farm uses on the land,' citing Matteo [v. Polk County, 11 Or LUBA 259 (1984) (Matteo I)[4]]. We believe the fourth sentence does not simply restate the requirement established by the first sentence. Although it certainly could be clearer, because the fourth sentence refers to establishment of 'farm uses,' rather than 'farm use as defined in ORS 215.203,' and cites Matteo I, the 'farm uses' referred to, like those referred to in the second and third sentences, are the farm uses which the proposed dwelling would be customarily provided in conjunction with. Thus, OAR 660-05-030(4) does not allow approval of a dwelling customarily provided in conjunction with farm use where the farm use that the dwelling would be customarily provided in conjunction with does not yet exist on the subject property. * * *" (Footnote omitted; final emphasis added.)

On remand from the court of appeals' decision in Forster, we adhered to our conclusion in Hayes, that under OAR 660-05-030(4), a dwelling customarily provided in conjunction with farm use may not be approved until the farm use that justifies such a dwelling exists on the subject property. Forster v. Polk County, 24 Or LUBA 476, 481 (1993) (Forster II). However, we also noted that the county could comply with OAR 660-05-030(4) by determining the

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[4]We also emphasized in Hayes v. Deschutes County that Matteo I requires that "the farm use to which the [proposed farm] dwelling relates must be existing," and that neither Newcomer II, nor the administrative history of OAR 660-05-030(4) cited therein, indicates any intent to overrule Matteo I.

amount of farm use required by OAR 660-05-030(4), conditioning issuance of a building permit for the farm dwelling on the establishment of that amount of farm use on the property, and requiring that notice and an opportunity for a hearing be provided to all parties with regard to determining compliance with such condition. Forster II, supra, 24 Or LUBA at 482 n 9; see McKay Creek Valley Assoc. v. Washington County, 24 Or LUBA 187, 198 (1992), aff'd 118 Or App 543, rev den 317 Or 272 (1993).

The challenged decision determines that a dwelling in conjunction with the proposed 14 acre strawberry operation would be a dwelling "customarily provided in conjunction with farm use," as required by MCZO 136.040(a)(2) and (f).[5] However, all parties concede no part of the proposed strawberry operation was in existence on the subject property when the county made its decision to approve the proposed farm dwelling. The county imposed the following relevant conditions:

> "* * * * *
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> "2. Prior to the issuance of a building permit for the [farm] dwelling, the applicants shall provide evidence to the Planning Division that a contract has been secured for [sale

[5]It is not clear, however, that we can infer from this finding that the entire 14 acre strawberry operation must be in existence on the subject property in order to satisfy ORS 215.283(1)(f) and OAR 660-05-030(4). The findings also refer to "Planning Division guidelines" indicating that "a minimum of 10 acres of strawberries are necessary for a viable commercial operation." Record 6, 9.

of] the strawberries produced on the property.

"3. Prior to obtaining a building permit for the dwelling, the applicants shall provide verification to the Planning Division that steps have been taken to implement the farm operation in accordance with the proposed use. Such evidence may include, but is not limited to, evidence of the purchase of the strawberry plants and evidence of the purchase of farm equipment necessary to maintain the crop.

"4. Within one year from the date of this approval, at least 50% of the proposed strawberry operation shall be in place.

"* * * * *" Record 10.

Condition 2 above requires that the applicants secure a contract for sale of the strawberries before issuance of a building permit for the proposed farm dwelling. This does not constitute current farm use of the subject property. Condition 3 requires that "steps [be] taken to implement the farm operation" prior to issuance of the building permit. However, there is no requirement that such steps must include actually putting any portion of the subject property to the proposed farm use. Condition 4 requires that 50% of the proposed farm operation be in place in one year, but does not prevent issuance of a building permit for the proposed farm dwelling prior to this occurrence. In addition, the decision does not establish what procedures

will be used to determine compliance with these conditions.[6]

In conclusion, we agree with petitioners that the county's decision fails to comply with ORS 215.283(1)(f) and OAR 660-05-030(4). The decision erroneously approves a farm dwelling where the farm use justifying the dwelling does not exist on the subject property, and without requiring that such farm use be established on the subject property prior to issuance of a building permit for the proposed farm dwelling.[7]

This subassignment of error is sustained.

B. Commercial Farm Enterprise

In order to approve a farm dwelling in the EFU zone, the county must find:

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[6]In its brief, the county argues that MCZO 110.680 (Administration of this Ordinance) requires it to use an "administrative review" procedure, which includes notice to neighboring property owners and an opportunity to request a hearing, when determining whether "dwellings * * * are in conjunction with farm or forest uses when such uses are a permitted use in the applicable zone." However, this interpretation is not expressed by the county decision maker in the challenged decision and, therefore, we are not required to defer to it under Clark v. Jackson County, supra. We conclude that although MCZO 110.680 clearly required the county to follow its administrative review procedure in making the challenged decision, it is uncertain whether MCZO 110.680 also requires this procedure to be used in determining compliance with conditions of approval.

[7]On remand, the county may either (1) require the farm use that the proposed dwelling would customarily be provided in conjunction with to actually exist on the subject property; or (2) determine what constitutes the amount of farm use that the proposed dwelling would customarily be provided in conjunction with and condition its decision by requiring that amount to be established prior to issuance of a building permit. If the county chooses the latter course, it must make clear in its decision that the administrative review procedure of MCZO 110.680 or some other procedure including notice and the opportunity to request a hearing will be followed in determining compliance with such a condition.

> "The property and improvements shall constitute a commercial farm enterprise as determined by an evaluation of the factors in [MCZO] 136.040(g)." MCZO 136.040(a)(3).

MCZO 136.040(g) provides:

> "Commercial Farm Determination: When determining whether an existing or proposed parcel is a commercial farm enterprise, the following factors shall be considered:
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> "Soil productivity, drainage, terrain, special soil or land conditions, availability of water, type and acreage of crops grown, crop yields, number and type of livestock, processing and marketing practices, and the amount of land needed to constitute a commercial farm unit. Specific findings shall be made in each case for each of these factors." (Emphasis added.)

Petitioners contend the county's findings regarding four factors required to be considered under MCZO 136.040(g) -- "drainage, terrain, special soil or land conditions, [and] availability of water" -- are not supported by substantial evidence in the whole record. Petitioners argue that because compliance with MCZO 136.040(a)(3) must be determined by evaluation of the MCZO 136.040(g) factors and MCZO 136.040(g) requires specific findings to be made for each factor, if the findings on any one factor are not supported by substantial evidence in the record, the county's decision must be remanded.

The challenged findings state:

> "* * * There are no adverse conditions concerning * * * drainage, terrain, or special soil or land conditions. Water is available to the subject site by a well. * * *" Record 9.

Substantial evidence is evidence a reasonable person would accept as adequate to support a conclusion. Carsey v. Deschutes County, 21 Or LUBA 118, 123, aff'd 108 Or App 339 (1991); Douglas v. Multnomah County, 18 Or LUBA 607, 617 (1990). We have reviewed the evidence in the record cited by the parties. With regard to the factors of drainage, terrain and special soil or land conditions, we agree with the county that a reasonable person could rely on that evidence to support the above finding.

With regard to the factor of availability of water, the only evidence in the record cited by the parties are statements by the applicants that they intend to put in a well (Record 25, 44), and a memorandum from an extension agent stating there are many commercial berry growers in the area of the subject parcel (Record 38).[8] These statements do not say anything about the availability of water to the subject parcel, and would not allow a reasonable person to conclude that water is available to the subject parcel through a well.

The county also argues that its finding on water availability is supported by evidence in the Marion County Background and Inventory Document, which is part of the county's comprehensive plan. However, this "evidence" was not placed before the local decision maker below and is not

[8]The memorandum does not indicate the source of the water used by commercial berry growers in the area.

included in the local record. Our review is limited by ORS 197.830(13)(a) to the record of the proceeding below. We do not have authority to take official notice of adjudicative facts. Murray v. Clackamas County, 22 Or LUBA 247, 252 (1991); Blatt v. City of Portland, 21 Or LUBA 337, 342, aff'd 109 Or App 259 (1991).

We conclude the challenged decision is not supported by substantial evidence with regard to the findings on availability of water required by MCZO 136.040(a)(3) and (g).

This subassignment of error is sustained, in part.

Petitioners' assignment of error is sustained, in part.

The county's decision is remanded.